IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

BETH SANDERS, an individual, WILLIAM DAUGAARD, an individual and PATRICIA DAUGAARD, an individual, Plaintiffs, vs. The CITY OF SEATTLE, a municipality, ROUSE-SEATTLE, LLC., a limited liability company, and WESTLAKE CENTER ASSOCIATES LIMITED PARTNERSHIP, a Washington Partnership, Defendants.	No. 03-2-27838-6 SEA MEMORANDUM OPINION AND ORDER ON PENDING MOTIONS

THIS MATTER is before this Court on motions for summary judgment brought by all parties to this litigation: plaintiffs Beth Sanders, William Daugaard and Patricia Dauggard and defendants City of Seattle, Rouse-Seattle LLC, and Westlake Center Associates Limited Partnership. These motions were brought pursuant to Civil Rule 56. All parties contend that material facts are not in dispute and that this matter is ripe for adjudication pursuant to summary judgment.

The question before this Court is whether defendants violated plaintiffs' free speech rights when confronted by and told by Westlake Center security guards to lower anti-war

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signs held by plaintiffs en route to the Seattle Center monorail. The issue is whether a publicly dedicated easement within a private shopping mall constitutes a forum providing constitutional protections for free speech.

1. FACTS

Defendants Westlake Center Associates Limited Partnership and Rouse-Seattle LLC ("Rouse") own and operate Westlake Center, a privately owned urban shopping mall in downtown Seattle. Annual visitors and shoppers patronizing the mall is estimated at eight million people; approximately 2.4 million of those pass through Westlake Center to use the Seattle Center monorail.

The City of Seattle is granted an easement through Westlake Center to guarantee access to the monorail for members of the public. The terms of the easement are recited in the monorail easement and operating agreement. (Westlake/Rouse grants to the City for the benefit of the Monorail Station, an easement in the Monorail Station Platform and [designated] portions of the Improvements as the Interior Accessway and Exterior Accessway *for the purpose of pedestrian access between the Improvements and Monorail Station.)* Operating and Easement Agreement, Sec. 8(b). This easement covers portions of the first (ground), second and third floor corridors of Westlake Center, and access on the third (top) floor to an outdoor boarding platform, owned by the City of Seattle. The easement also includes internal escalators connecting all floors of the mall and access to and from the monorail. People can access the Monorail Station in one of three ways: (1) an enclosed staircase attached to the exterior of Westlake Center; (2) an elevator attached to the exterior of Westlake Center; or (3) up the internal escalators to the Monorail Station through a set of glass

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doors that open onto the Monorail Station platform. All three methods of access to the Monorail were available on February 15, 2003, the day of the protests in question in these cross-motions. There is no physical demarcation of the boundaries of the easement within Westlake Center.

The Easement and Operating Agreement provides in relevant part that, unless required by law or allowed by express authorization, people are not permitted to:

> parade, rally, patrol, picket, demonstrate or engage in any conduct that might tend to interfere with or impede the use of the Accessways or Monorail Station Platform by persons entitled to use the same, create a disturbance, attract attention or harass, disparage or be detrimental to the interests of any or the retail or business establishments within Westlake Center.

Agreement at 9(a)(i)(A).

On February 15, 2003, a large planned demonstration against a U.S. War in Iraq took place in Seattle. Large numbers of persons entered Westlake Center in downtown Seattle that day with signs on sticks in order to take the monorail from downtown Seattle to Seattle Center, in order to participate in the demonstration which began there. In anticipation of that protest, Westlake authorities instituted an oral policy that would allow protesters with mounted signs to enter the mall and access the monorail through the easement – provided the signs were lowered through the easement areas. During the day, Westlake Center security personnel were under instructions to initiate contact with anyone inside Westlake Center holding a mounted sign aloft, swinging a mounted sign, or otherwise using a mounted sign in any way that appeared to pose a threat to the safety of other Westlake Center patrons.

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On that day, Plaintiffs William Daugaard and Patricia Daugaard arrived at Westlake Center to use the monorail to participate in the demonstration. They shared a sign stating "No War Around the World, No War in Iraq, Not In Our Name," which was mounted on a stick. After the Daugaards reached the third floor, they observed that the line to the monorail was extremely long. As a result, they decided to leave Westlake Center, and travel to the demonstration by other means. As they descended the escalators on the inside of Westlake Center from the third floor to the first floor, they were repeatedly ordered to lower their sign by Westlake Center guards. Mr. Daugaard refused, and held the sign upright. The Daugaards then exited via the first floor and left Westlake Center.

On that same day, Plaintiff Sanders also arrived at Westlake Center to take the monorail to the demonstration at Seattle Center. Ms. Sanders held a sign saying "No Iraq War" mounted on a stick. There was an extremely long line of persons waiting for the monorail and Ms. Sanders walked to the end of the line to wait her turn to take the monorail. Ms. Sanders alleges she held her sign up so it could be read. Shortly thereafter, a Westlake Center guard approached Ms. Sanders and ordered her to lower her sign. Ms. Sanders declined to lower the sign, in spite of repeated requests. Several additional Westlake security guards arrived. One of the guards told Ms. Sanders that she would be physically removed from Westlake Center if she declined to lower her sign. The security officers advised Ms. Sanders of Westlake Center's policy to bar people who refuse to comply with its policies. One of the security officers told Ms. Sanders that she was barred from Westlake Center. Ultimately, Ms. Sanders lowered her sign and held it in front of her with the stick resting on the ground. Ms. Sanders

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soon boarded the monorail and participated in the protest. No formal barring action was pursued against Ms. Sanders.

2. DECISION

Thomas Jefferson, when inaugurated as the third president of the United States, stated that among the most important rights guaranteed under the U.S Constitution are the freedom of speech, freedom of religion, and the right to trial by jury. Free speech protection is also guaranteed under the Washington State Constitution, Article I, Section 5[1]. However, even these cherished fundamental constitutional protections are not unfettered. Peyote use has been found not to be protected by the First Amendment[2], family law cases such as dissolution and child custody are decided without jury[3], and speech in a public forum is subject to restrictions on "time, place, and manner of expression." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

A. This Court must determine the characterization of the forum to analyze the scope of free speech afforded to plaintiffs.

Analysis of the scope of free speech is determined largely by characterization of the forum in which the conduct or speech occurred. The U.S. Supreme Court has identified three distinct categories of government property: (1) traditional public forum; (2) designated public forum; and (3) nonpublic forum. *See, e.g., Arkansas Educ. Tele. Comm'n v. Forbes*, 523 U.S. 666, 118 S.Ct. 1633, 1641, 140 L.Ed.2d 875 (1998); *Perry*

[1] *See* T. Jefferson, First Inaugural Address, March 4, 1801.
[2] *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990).
[3] *See* RCW 26.09.010

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Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45- 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

Traditional public fora are places that "by long tradition or by government fiat have been devoted to assembly and debate." *Perry*, 460 U.S. at 45, 103 S.Ct. 948. Quintessential traditional public fora are streets, sidewalks, and parks, for they "have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions." Id. (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)); *see also, e.g.*, *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1244 (10th Cir.1998) (en banc), cert. denied, 526 U.S. 1039, 119 S.Ct. 1334, 143 L.Ed.2d 499 (1999).

Designated public fora make up the second category of government property. The designated public forum, whether of a limited or unlimited character, is one a state creates "by intentionally opening a non-traditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). Examples of designated public fora include: state university meeting facilities expressly made available for use by students, *see Widmar v. Vincent*, 454 U.S. 263, 267-69, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); school board meetings open to the public by state statute, *see City of Madison, Jt. Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174-75, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976); advertising space in state-owned subway and commuter rail stations, *see Christ's Bride Ministries, Inc. v. Southeastern Penn. Transp. Auth.,* 148 F.3d 242, 252 (3d Cir.1998); a city owned and operated senior center sponsoring

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lectures, *see Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278 (10th Cir.1996); and public libraries, *see Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1261 (3d Cir.1992).

The final category, the nonpublic forum, consists of any remaining government property that "is not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46, 103 S.Ct. 948; *accord Int'l. Soc. For Krishna Consciousness; Lee*, 505 U.S. at 678, 112 S.Ct. 2701; *Church on the Rock*, 84 F.3d at 1278

Plaintiffs in this case argue that the easement granted by the City of Seattle and its surrounding areas should be characterized as a traditional public forum. The government's ability to restrict speech in a traditional public forum is quite limited and depends upon whether the speech restriction is content-based or content-neutral. The government must show that a content-based restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry,* 460 U.S. at 45, 103 S.Ct. 948; *accord Forbes,* 118 S.Ct. at 1641. On the other hand, courts have permitted content-neutral time, place, and manner restrictions on speech provided they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry,* 460 U.S. at 45, 103 S.Ct. 948.

Conversely, defendants in this case assert that the easement (and its surrounding area) is at most a nonpublic forum or not a forum at all. In a nonpublic forum, the government has much greater latitude to restrict protected speech. The law draws no distinction between content-neutral and content-based restrictions in a nonpublic forum. Provided the restriction is reasonable in light of the purpose served by the forum and is "not an effort to suppress expression merely because public officials oppose the

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speaker's view," it does not violate the First Amendment. *Forbes,* 118 S.Ct. at 1641; *see also, e.g., Lee,* 505 U.S. at 679, 112 S.Ct. 2701; *Cornelius,* 473 U.S. at 806, 105 S.Ct. 3439. For a court to uphold a speech restriction as reasonable, "it need not be the most reasonable or the only reasonable limitation." *Lee,* 505 U.S. at 683, 112 S.Ct. 2701. Washington courts apply the same standard, however, under Article I, section 5 for speech in a nonpublic forum as is applied under the First Amendment. "Speech in nonpublic forums may be restricted if ' "... the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. ' " *Huff,* 111 Wash.2d at 926, 928, 767 P.2d 572 (quoting *City of Seattle v. Eze,* 111 Wash.2d 22, 32, 759 P.2d 366 (1988) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)). *See City of Seattle v. Mighty Movers, Inc.,* 96 P.3d 979 (2004).

Plaintiffs rely on a series of cases that have held that sidewalks and other public thoroughfares have historically provided a public forum for expressive activity.

In *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092 (9th Cir., 2003), the Ninth Circuit Court of Appeals “emphasized the following three factors in considering whether an area constitutes a traditional public forum: 1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area, *see, e.g., Venetian Casino Resort,* 257 F.3d at 944-45, 948; *Hale,* 806 F.2d at 916; 2) the area's physical characteristics, including its location and the existence of clear boundaries delineating the area, *see, e.g., Gerritsen,* 994 F.2d at 576; and 3) traditional or historic use of both the property in

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question and other similar properties, *see, e.g., Venetian Casino Resort,* 257 F.3d at 944, *Jacobsen v. Bonine,* 123 F.3d 1272, 1274 (9th Cir.1997)."

Other circuits have concurred that "[e]xpressive activities have historically been compatible with, if not virtually inherent in, spaces dedicated to general pedestrian passage." *First Unitarian Church,* 308 F.3d at 1128 (10th Cir.2002); *see also Lederman,* 291 F.3d at 43 (D.C.Cir.2002) ("If people entering and leaving the Capitol can avoid running headlong into tourists, joggers, dogs, and strollers ... then we assume they are also capable of circumnavigating the occasional protester."); *Warren,* 196 F.3d at 189-90 (4th Cir.1999) (en banc); *cf. ACORN,* 150 F.3d at 702 (7th Cir.1998) (concluding that sidewalks at Navy Pier entertainment complex were not public forums because they were not "part of the city's automotive, pedestrian, or bicyclists' transportation grid").

The final factor considered in determining whether an area is a traditional public forum is its historic use as a public forum and whether it is part of the class of property which, by history and tradition, has been treated as a public forum. *Venetian Casino Resort,* 257 F.3d at 943-44 (considering the fact that the sidewalk that was replaced had historically been a public forum); *Jacobsen v. Bonine,* 123 F.3d at 1274 (noting that interstate rest stop areas, as relatively modern creations, have not traditionally been used for expressive activity). This is a factor routinely addressed and considered by the courts. *See, e.g., Lee,* 505 U.S. at 680-81, 112 S.Ct. 2701; *Grace,* 461 U.S. at 178-79, 103 S.Ct. 1702 (holding that although traditionally property itself had not been held open for use of public, it was a public forum because it belonged to the class of property historically available for expression); *First Unitarian Church,* 308 F.3d at 1129; *Freedom from Religion,* 203 F.3d at 494; *Warren,* 196 F.3d at 190, 196.

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In *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, (9th Cir., 2003) the Court of Appeals held that a converted pedestrian mall met the requirements of traditional use. The federal appellate court noted there was no dispute that Fremont Street was historically a public forum. Moreover, precedent regarded public pedestrian malls and commercial zones as the type of property traditionally used as a public forum. Thus, in *Gaudiya Vaishnava Society v. City & County of San Francisco*, the court held that San Francisco's commercial Fisherman's Wharf and Union Square districts were public fora. 952 F.2d 1059, 1061, 1065 (9th Cir.1990), *as amended* (9th Cir.1991). Despite their concentration of businesses, their distinctive character, and their role in fostering commerce, the court considered these venues to be public streets, and thus traditional public fora*; see also Perry v. Los Angeles Police Dep't,* 121 F.3d 1365, 1368, 1369 (9th Cir.1997) (holding that the Venice Beach Boardwalk was a traditional public forum, and its commercial nature was relevant not to public forum status, but to the outcome of the time, place, and manner test). The Fremont Street Experience was not only historically a public forum, but also fell into the type of property that is traditionally regarded as a public forum.

Plaintiffs maintain that "it is undisputed that expressive activity, including expressive activity unrelated to shopping, has taken place in the easement– and with the Rouse Defendants' express permission – since the shopping center was created nearly two decades ago." This is true. However, defendants' admitted designation of portions of the easement for expressive activity does not in itself convert the entirety of the easement to an expressive forum.

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B. The easement portion of Westlake Mall is properly characterized as a nonpublic forum because it is dedicated for a limited purpose and does not have as a principal purpose the free exchange of ideas.

The tension that exists here is between the line of cases that provide for public forum free speech protection because of the traditional nature of such forum and those cases that have considered the practical use and limitations of such facilities or fora. In the former category is the privatization of traditional public fora such as sidewalks, as addressed in *Venetian Casino Resort*, 257 F.3d at 944 and *First Unitarian Church,* 308 F.3d at 1129 and pedestrian malls, such as *American Civil Liberties Union of Nevada v. City of Las Vegas***,** 333 F.3d 1092, (9th Cir.,2003). In the latter category are what may be characterized as limited use or limited access passageways, e.g., *Chicago Acorn v. Metro. Pier & Expo. Auth.,* 150 F.3d 695, 702 (7th Cir.1998) (sidewalks at Navy Pier entertainment complex not "part of the city's automotive, pedestrian, or bicyclists' transportation grid"); *United States v. Kokinda,* 497 U.S. 720, 728-29, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (plurality op.) (sidewalk access from parking lot to post office not public forum); *Hawkins v. City of Denver,* 170 F.3d 1281, 1287 (10th Cir.1999) (public passageway to fine arts center not public forum.)

In *Kokinda*, Justice O'Connor concluded that the postal sidewalk was not a traditional public forum, by considering not only the postal sidewalk's purpose, but also its location, *see* 110 S.Ct. at 3121, the degree of public access afforded by the sidewalk, *see id.* at 3120, and whether such sidewalks had " 'traditionally served as a place for free public assembly and communication of thoughts by private citizens.' " *Id.* at 3121 (quoting *Greer,* 424 U.S. at 838, 96 S.Ct. at 1217).

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Subsequent to the *Kokinda* decision, the U.S. Supreme Court noted that similar to the sidewalk in *Kokinda,* the Port Authority's air terminals are remote from pedestrian thoroughfares and are intended primarily to facilitate a particular type of transaction--air travel--unrelated to protected expression. Rejecting a generalized analysis that all segments of transportation grids should be regarded as a public forum, the U.S. Supreme Court in *Krishna Consciousness* noted:

> When new methods of transportation develop, new methods for accommodating that transportation are also likely to be needed. And with each new step, it therefore will be a new inquiry whether the transportation necessities are compatible with various kinds of expressive activity. To make a category of "transportation nodes," therefore, would unjustifiably elide what may prove to be critical differences of which we should rightfully take account. … As commercial enterprises, airports must provide services attractive to the marketplace. In light of this, it cannot fairly be said that an airport terminal has as a principal purpose promoting "the free exchange of ideas." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 800, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985). To the contrary, the record demonstrates that Port Authority management considers the purpose of the terminals to be the facilitation of passenger air travel, not the promotion of expression.

112 S.Ct., at 2707.

Recently, in *Mighty Movers,* the Washington Supreme Court quoted from and adopted *Krishna Consciousness v. Lee*'s reasoning in addressing whether utility poles constituted a public forum: "[G]iven the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immemorially . . . time out of mind been held in public trust and used for purposes of expressive activity." 96 P.3d at 987. As first stated by the plurality in *Hague,* heightened protection is afforded to the use of property that has immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. [Use of

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such] places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. *Id.*

Our Supreme Court went on to note that "a traditional public forum is property that has as 'a principal purpose ... the free exchange of ideas.' " *Id*., citing *Krishna,* 505 U.S., at 679, 112 S.Ct. 2701. However, these courts have not accepted plaintiffs' contention that any place where the public has free access is necessarily a traditional public forum.

Applying the factors set out by Justice O'Connor in the *Kokinda* case and adopting the principles enunciated in the recent *Mighty Mover* decision, this Court concludes that the easement created in Westlake Mall does not constitute a public forum for purposes of free speech analysis.

There is certainly ample authority to support the concept that large shopping malls are characteristic of modern day town squares. *See Marsh v. Alabama,* 326 U.S. 501 (1946); *Food Employees v. Logan Valley Plaza,* 391 U.S. 308 (1968). However, the courts have not extended traditional public forum status to these venues when considering their private ownership. *Southcenter Joint Venture v. National Democratic Policy Comm.*,113 Wn.2d 413, 780 P.2d 1282 (1989); *Lloyd Corp v. Tanner*, 92 S.Ct. 2219, 407 U.S. 551 (1972).

In this instance, Westlake Mall is a privately-owned shopping center – but one with a public easement running through it. Although our case is somewhat unique in its facts, this Court finds guidance in the principles enunciated by Justice O'Connor in the *Kokinda* case and by our Supreme Court in *City of Seattle v. Mighty Movers*.

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First, under the *Kokinda* analysis, we should consider the limited purpose for which the public easement was granted: to provide ingress and egress for passengers of the Seattle Center monorail ("*for the purpose of pedestrian access between the Improvements and Monorail Station.")*. The location of the easement itself is a small swath of Westlake Center, a significant portion of which is in the form of escalators running to and from the ground floor to and from the top floor of the mall where the monorail is located. The third factor, the degree of public access, is significant: over 2.4 million people access the monorail via the Westlake Mall annually. Finally, this Court considers whether the easement (or this type of venue) has "traditionally served as a place for free public assembly and communication of thoughts by private citizens." *Kokinda, supra,* at 3121. On this last point, we are guided by our Supreme Court's recent pronouncement in *Mighty Movers*, quoting from the *Lee* case:

> [H]eightened protection is afforded to the use of property that has immemorially held in trust for the use of the public and ….has been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions….A traditional public forum is property that has as "a principal purpose…the free exchange of ideas.

96 P.3d at 987, citing *Krishna*, 505 U.S. at 679

It is difficult to conceive of escalators (and their adjoining areas) in a private shopping mall characterized as "a traditional public forum… that has as a principle purpose…the free exchange of ideas." While it is true that the escalators are part of a transportation grid, not all "transportation nodes" are "compatible with various kinds of expressive activity." *See Krishna v. Lee*, 505 U.S., at 2707. This Court concludes that given the limited scope of the easement, the nature of the easement, the purpose of the easement, and the lack of any historical use for the limited type of easement for public

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expression, the easement portion of Westlake Mall is properly characterized as a nonpublic forum.

C. The restriction on mounted signs imposed by Westlake Mall policy was reasonable in light of the purpose of the forum and all surrounding circumstances.

Having characterized the easement as a nonpublic forum, the restriction imposed by the Westlake Mall by its policy and effectuated by the security guards "need satisfy only a requirement of reasonableness. It need not be the most reasonable or the only reasonable limitation." *Kokinda*, 497 U.S., at 730, 1110 S.Ct., at 3122 (plurality opinion) quoting *Cornelius, supra*, 473 U.S. at 808, 105 S.Ct. at 3452). "The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. "In examining the compatibility between the prohibited speech and the particular forum, we ask whether the restrictions on speech are reasonably related to maintaining the environment that the government has deliberately created." *Perez v. Hoblock*, 368 F.3d 166, 173 (2d. Cir. 2004). In this case, the easement was created and publicly dedicated for the limited purpose of access to the monorail station. The oral policy implemented on the day in issue was limited to prohibiting people from carrying mounted signs through a narrow corridor. This restriction was limited to potential safety concerns in a highly controlled and physically limited environment. In addition, the restriction must be viewpoint neutral. It can not be "an effort to suppress expression merely because public officials oppose the speaker's view." *Cornelius*, 473 U.S. at 800. Westlake Center's policy applied to these plaintiffs was viewpoint neutral. Protesters were prohibited from carrying mounted signs inside Westlake Center without regard to the viewpoint or content of the sign. Plaintiffs attempted to offer anecdotal evidence that one of the security guards told a plaintiff to lower her sign "because it was

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scaring shoppers." Thus, plaintiffs assert that defendants' claimed reason for the policy was, in fact, pretextual. However, even accepting such a statement as true (which this Court must do on summary judgment), it is undisputed that the policy was implemented prior to this guard's alleged contact with one of the plaintiffs. The policy itself was reasonable and viewpoint neutral, and therefore not violative of plaintiffs' free speech rights.

D. Alternatively, even if the easement were a traditional public forum, the restriction constitutes a valid time, place, and manner restriction.

As an alternative analysis, this Court considers whether such a restriction would satisfy the "time, place, and manner" heightened scrutiny requirement if the easement were a traditional public forum. In Washington, a time, place or manner restriction is valid if it is narrowly tailored to serve a compelling state interest and provides sufficient alternative channels of communication. *See Collier v. City of Tacoma*, 121 Wn.2d 737, 747-48 (1993). Alternatively, if this Court were to conclude that the easement were a public forum—which it is not—the restriction on mounted signs would constitute a valid time, place, or manner restriction because the easement is incompatible with this type of picketing with mounted signs. This restriction on the locale of raising mounted signs – regardless of content – is within the type of ban on expressive activity that has been allowed by other courts. See *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth*., 984 F.2d 1319 (1st Cir. 1993). (Ban on leafleting within fifteen feet of platform reasonable restriction based on safety concerns.)

> "The Authority, of course, may tailor the Guidelines narrowly to achieve its interest in public safety. For example, plaintiffs concede that the MBTA legitimately may ban expressive activity during especially crowded peak hours when the dangers to the public are greater. Ironically, the Guidelines already contain narrowly drawn time, place, and manner restrictions that satisfy the MBTA's specific concerns. The Guidelines forbid littering, leaving literature unattended, and interfering with the safety of the passengers or the operation of the subway trains. In

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> addition, to minimize the risk of accidents, the MBTA maintains a 15-foot safety zone around elevators, stairwells, kiosks, turnstiles, the edge of any train platform, and other high risk structures. It also bans expressive activity from areas less than 15 feet wide. The Guidelines authorize the ejectment of any person who violates these prohibitions."

Id. at 1326.

Thus, this Court would conclude that the proscription against raising mounted signs within the limited confines of moving escalators and narrow passageways would be a permissible time, place, manner restriction. Defendants, on summary judgment, presented evidence that the purpose of Westlake's Free Speech Policy "is to protect members of the public from being injured by people carrying poles and sticks through Westlake Center." Preserving public safety is a compelling interest in. *See Robinson v. City of Seattle*, 102 Wn.App. 795, 823 (2000).

To satisfy the "narrowly tailored" requirement, a restriction on expression need not be the least restrictive means possible to achieve the state's interest, but must only promote a compelling government interest "that would be achieved less effectively absent the regulation and [that] is not substantially broader than necessary to achieve the government's interest." *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1045 (9th Cir. 2002); *see also Hill v. Colorado*, 530 U.S. 703, 725 (2000).

Westlake's policy was applied in this case only to mounted signs. There was no evidence that at the time of the protest people were prevented from carrying unmounted signs in Westlake Center, or to carry mounted signs in the many areas outside the mall area in the plaza to the south or across Pine Street in Westlake Park. The restriction imposed that day did not prevent people from expressing a political or other message by carrying a sign in Westlake Center; it only prohibited people from conveying that message in the public easement in the mall itself on a mounted stick or pole.

Moreover, protesters had other avenues and venues readily available to express their views. The mounted sign restriction still "leaves open practical and available

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alternative channels of communication." *DCR, Inc. v. Pierce Cty.*, 92 Wn.App. 660, 679 (1998). These included venues both inside and outside the Westlake Center: Unmounted signs were permitted in the mall and the easement; protesters could express themselves through buttons or articles of clothing are permitted to do so anywhere in Westlake Center, provided the message communicated by the button or articles of clothing; protesters with mounted signs could access the Monorail Station by using the exterior staircase or by riding the exterior elevator or lower mounted signs on the escalators and adjoining areas; protesters could display mounted signs Westlake Plaza, frequently the site of rallies, protests and other forms of public expression ; speakers are also permitted (with authorization) to use the exterior platform attached to the second floor of Westlake Center ("speakers' balcony") to address rallies or demonstrations.

These proximate and available venues provided "open practical and available alternative channels of communication," creating a reasonable time, place, and manner restriction under the Westlake policy.

E. This Court declines to consider the overbreadth challenge based on untimeliness and plaintiffs' lack of standing.

Finally, plaintiffs mount a constitutional challenge to the Westlake policy and the subject provisions of the Easement and Operating Agreement on an overbreadth analysis. This Court declines to consider this challenge for two reasons: the challenge was not timely raised and it is not appropriate to consider under the facts of this case.

With respect to the timeliness issue, this court notes that none of plaintiffs' complaints or amended complaints addressed the overbreadth constitutional challenge to the agreement and policy. Nor did the Joint Status Report filed by the parties. Rather, the issue appears to have been raised for the first time in the parties' cross-motions for summary judgment. As a consequence, neither defendants nor the Court

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were timely advised of this theory of the case. Thus, plaintiffs have "failed to provide the City [and defendant Westlake] adequate notice of the nature of the claims against which it would have to defend." See *Kirby v. City of Tacoma*, __ Wn.App. __, 98 P.3d 827, 835 (Sept. 14, 2004). For this reason alone, this Court could decline to consider the overbreadth challenge. However, turning to the substance of the claim, this Court concludes plaintiffs' challenge to be inappropriate under the facts of this case.

The overbreadth doctrine is a narrow exception to the "general rule that a litigant only has standing to vindicate his own constitutional rights." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 797, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). This Court declines to consider the overbreadth doctrine in this case because the risk of a chilling effect on free speech here is not "substantial." "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id*.

Here, the restriction imposed was on the manner in which signs were carried. Plaintiffs seek to challenge the content-based aspects of the Easement and Operating Agreement. Recently, the Washington Supreme Court addressed the overbreadth doctrine in analyzing the constitutionality of a Seattle ordinance banning signs on utility poles. Our Supreme Court relied on a U.S. Supreme Court case, *Members of City Council of L.A. v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), interpreting a similar Los Angeles ordinance:

> First, the Court held that an overbreadth challenge was inappropriate. The Court noted that the facial overbreadth doctrine represents an exception to the general rule that a litigant only has standing to vindicate his own constitutional rights. *Vincent,* 466 U.S. at 798, 104 S.Ct. 2118. As the doctrine developed, however, the Court recognized that the overbreadth doctrine itself "might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule." *Id.* at 799, 104 S.Ct. 2118. In the case of the Los Angeles ordinance, the Court held,

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> Taxpayers failed to identify any "significant difference between their claim that the ordinance is invalid on overbreadth grounds and their claim that it is unconstitutional when applied to their political signs." *Id.* at 802, 104 S.Ct. 2118. Taxpayers did not show that the ordinance applied to "any conduct more likely to be protected by the First Amendment than their own crosswire signs." *Id.* Accordingly, the Court declined to conduct an overbreadth analysis. The Court also observed that because Taxpayers conceded that the ordinance served its safety purpose in some of its applications, the ordinance was not subject to the claim that it was facially invalid in all of its applications. *Id.* The Court therefore limited its analysis to the facts before it, i.e., whether, as applied to the expressive activity of the Taxpayers, the ordinance violated the First Amendment. *Id.* at 802, 104 S.Ct. 2118.

152 Wash.2d 343, 355.

This Court reaches the same result: because the restrictions in the Easement and Operating Agreement and Westlake's Free Speech Policy served a safety purpose in some of its applications, the agreement and policy should not be not subject to the claim that they are facially invalid in all of their applications.

3. Conclusion and Orders

Based on the foregoing, this Court orders the following:

a. The motions of defendants City of Seattle, Rouse-Seattle LLC, and Westlake Center Associates Limited Partnership for summary judgment are hereby GRANTED; and

b. The motions of plaintiffs' Beth Sanders, William Daugaard and Patricia Daugaard for summary judgment are hereby DENIED.

Based on the above, plaintiffs' complaint is dismissed, with prejudice, with the issue of costs reserved for further consideration.

Dated this 16th day of December, 2004.

/s/
John P. Erlick, Judge

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